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No. 309

In the Supreme Court of the United States

OCTOBER TERM, 1968

LEO KUBIK AND J. C. WHITE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. After a jury trial in the United States District Court for the Southern District of Iowa, petitioner Kubik was convicted on all four counts of an indictment charging him with conducting a retail liquor business and: (1) failing to maintain records of the liquor received; (2) knowingly refusing to produce records to authorized officers of the Internal Revenue Service; (3) possessing a bottle containing liquor other than that contained at the time federal tax stamps were affixed; and (4) conspiring with petitioner White to carry on a retail liquor business without conforming to federal statutes and regulations (26 U.S.C. 5124, 5301, 5603, 5606; 18 U.S.C. 371).

316-727—68

Petitioner White was charged only with conspiracy, and was convicted. Kubik was sentenced to concurrent terms of one year in prison and was fined $1,000. White was sentenced to ninety days' imprisonment, to be followed by two years' probation, and was fined $250. The court of appeals affirmed (Pet. App. A 1a–11a).

2. The sufficiency of the evidence is not in dispute. The proof showed that Kubik was the manager and *de facto* owner of nightclub known as the Shangrila Club in Carter Lake, Iowa. The Club featured a swimming pool, pool tables, and a bar, among other facilities, and only persons known to petitioners were admitted.

The beverage practices of the Club came under the suspicion of the Alcohol and Tobacco Tax Unit of the United States Treasury Department. On August 21, 1964, Narcotics Agent Gooder, operating as an undercover agent for the A.T.T.U., went to the Club with a private individual known to Kubik. Gooder met Kubik and both Gooder and his companion purchased alcoholic drinks for $1.00 per drink[1] (Tr. 73–76, 84–87). On subsequent occasions in August, Gooder returned to the Club, taking with him

[1] Petitioners' defense, which they concede was disbelieved by the jury (Pet. 5), was that the Club was a "bottle club," dispensing liquor to members from their own bottles stored on the Club premises. A waitress at the Club testified that drinks were often sold; that the price was $1.00 per drink; and that the liquor was poured from three glass decanters (containing, respectively, Scotch, Vodka, and Bourbon) kept behind the bar (Tr. 307–308).

A.T.T.U. Agent Finney. On each of these visits, the agents purchased alcoholic drinks for $1.00 each (Tr. 68–73, 77–79, 102–104, 108–112). In September 1964, Finney went to the Club with an agent of the Iowa State Liquor Commission and purchased drinks (Tr. 119, 121–123). During none of these visits did the agents disclose their official status (see Tr. 79, 118–119, 125).

On October 27, 1964, Agent Finney went alone to the Shangrila Club prior to opening time to speak with petitioner Kubik. In order to protect himself in case Kubik offered him a bribe, Finney took with him electronic equipment for transmitting and recording the conversation (Tr. 125–126, 138).[2] Finney identified himself to Kubik as an A.T.T.U. Agent and told him that, since Kubik had applied for a retail liquor dealer's special federal occupational tax stamp, he (Finney) desired to inspect the premises. When he asked if Kubik stored any liquor in the Club, Kubik replied that all the liquor was kept in the trunk of his car. Kubik inquired if Finney wanted to see it, and Finney said he did. Kubik then opened the trunk of his car, revealing approximately two cases of liquor. When Finney asked where Kubik purchased his liquor, Kubik named a number of local retail shops. Finney informed him that, under federal law, he was

[2] After a hearing outside the presence of the jury, the trial judge excluded the tape recordings of the conversation solely on the ground that they contained much prejudicial matter concerning violations of state law (*e.g.*, with respect to gambling and padlocking) unrelated to the present charges (Tr. 97–98, 143–146).

required to purchase liquor from a person who had paid the tax as a wholesale liquor dealer.[3] Finney inquired whether Kubik kept records of his liquor purchases. Finney also advised Kubik that, contrary to Kubik's practice, he was required to keep records of his liquor purchases, and was not allowed to pour liquor from stamped bottles into decanters which did not show payment of the federal tax. When Finney observed that Kubik had not posted his retail liquor dealer's occupational tax stamp, as required, Kubik produced the stamp from his wallet and taped it to the wall (Tr. 147–153). Finney informed him that the violations he had observed that day would have to be reported to the United States Attorney (Tr. 162).

On February 6, 1965, at 3:00 a.m., Finney returned to the Shangrila Club in the company of A.T.T.U. Agent Daley (Tr. 166, 224–225). The agents told Kubik that they wanted to inspect the premises and check his records. Kubik said "Are you kidding, as busy as we are?" The agents replied that they were not kidding. Kubik then said that he did not have any records (Tr. 167–169, 226–228). The agents looked behind the bar and found three bottles of liquor, which they seized. They asked Kubik if he had any other distilled spirits. Kubik stated that he had none inside but

[3] Finney testified that part of his purpose in going to see Kubik was to advise him of the requirements of federal law (Tr. 134–135). When Kubik expressed curiosity as to the requirement that he purchase liquor from a wholesale liquor dealer, Finney went back to his car, got a copy of the 1954 Internal Revenue Code, and read pertinent portions of it to Kubik (Tr. 156–157).

had some in the trunk of his car. He inquired whether the agents wanted to see it. Kubik thereupon took them outside to his car and opened the trunk, where twenty-nine more bottles of liquor were found. The agents then placed Kubik under arrest and seized the liquor (Tr. 170–172, 228–231).

3. Prior to trial, petitioners moved to suppress all statements made by petitioner Kubik and the evidence seized from the Club and his car, on the ground that Kubik had not been informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436. After holding an evidentiary hearing, the district judge denied the motion, concluding that no warnings were necessary since petitioner Kubik was not in custody at the times he gave his statements and volunteered to show the agents the liquor in his car (Pet. App. A. 11a–14a). The court of appeals affirmed, stating (Pet. App. A, 8–9):

> In our view the events that transpired were part of a pre-custody routine investigation by a diligent federal agent to determine whether the Shangrila Club had complied with the federal liquor laws. On this record we are convinced that Finney's questions were not tantamount to a custodial interrogation initiated after Kubik had been taken into custody or deprived of his freedom of action in any significant way.

4. These holdings, we submit, were correct, and are, as petitioners recognized (Pet. 12), in accord with the views of the other federal courts. This Court in *Mi-*

randa v. *Arizona, supra,* made clear that the need to give the warnings there deemed necessary to protect a suspect's Fifth Amendment privilege against self-incrimination applies only in situations where the suspect is "in custody at the station or otherwise deprived of his freedom in any significant way" and that "[g]eneral on-the-scene questioning * * * is not affected by our holding." 384 U.S. at 477. Here, as both courts below observed, there were no oppressive circumstances tending to overbear Kubik's freedom of action. He was in familiar surroundings, not in a police station or prison, and had not been placed under arrest or other form of restraint. Thus the reason given by the Court in *Miranda* for the warnings is not present. Indeed petitioners' proposed rule (see Pet. 3)—that warnings be required whenever there is an official investigation that seeks to elicit from an individual information which may be of use in a criminal prosecution—is in direct conflict with decisions of this Court, such as *Hoffa* v. *United States,* 385 U.S. 293, and *Lewis* v. *United States,* 385 U.S. 206, holding that the government may use informants and undercover agents during an investigation.

The facts of the present case underscore the reasons why *Miranda* governs custodial interrogations and not field investigation. When the agent first talked to Kubik in October, he not only revealed his identity but undertook to give Kubik explicit notice of the requirements of federal law, including the necessity for keeping records. There would be no reason for a *Mi-*

randa warning in that situation.[4] It was more than three months later that the agents went back to see if there had been compliance. The agents did not undertake to interrogate petitioner; they made a demand for the books which, as A.T.T.U. agents, they had a right to inspect at Kubik's place of business. 26 U.S.C. 5146. Such an investigation is entirely different from the custodial interrogation to which *Miranda* relates.[5]

Nor does *Mathis* v. *United States*, 391 U.S. 1, support petitioners' position. In that case, the Court applied *Miranda* to interrogation of a person then in state custody on other charges, holding that the reason why a person is "in custody" is irrelevant to the obligation to advise him of his rights under *Miranda* before questioning him. Contrary to petitioner's contention (Pet. 10–11), that decision does not signal the need for warnings in all tax investigations. That tax violations were involved was held immaterial. Rather, the decision squarely rejects the position

[4] This "confrontation" can scarcely be deemed comparable to the administrative hearing involved in *In re Groban*, 352 U.S. 330. The request that *Groban* be reexamined is thus inappropriate in the context of this case.

[5] So far as the liquor in the car is concerned, Kubik was correctly found by the courts below to have voluntarily offered to show the agents the liquor. Thus, the case is quite different from *Bumper* v. *North Carolina*, 391 U.S. 543, on which petitioners rely (Pet. 16). The *Miranda* warnings do not apply to the voluntariness of consent to a search. See Brief for the United States in Opposition in *Vickers* v. *United States* (No. 1187 Misc. O.T. 1967, certiorari denied, June 10, 1968).

petitioners urge, for the Court made even more clear that the situation which triggers the requirement of *Miranda* warnings is not investigation, but custody. See 391 U.S. at 4–5.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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